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No. 92-554

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JAMES DOYLE FLEENOR, *et al.*,
Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT ILLINOIS CENTRAL RAILROAD COMPANY

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QUESTIONS PRESENTED

1. Did the court of appeals err in affirming the district court's determination that it lacked subject matter jurisdiction over Plaintiffs' claims that Illinois Central had erroneously interpreted certain of its collective bargaining agreements in view of the fact that such claims are subject to mandatory arbitration under the Railway Labor Act?

2. Was Illinois Central entitled to summary judgment in light of the district court's findings that each of the Plaintiffs had admitted that Illinois Central had not violated any of his rights under applicable collective bargaining agreements?

3. Did the court of appeals err in affirming the district court's denial of Plaintiffs' motion for class certification and Plaintiffs' alternate motion for leave to amend their complaint and add 184 additional plaintiffs nearly three years after the close of discovery, nearly three years after the date set for the filing of such motions in the court's Agreed Scheduling Order, and more than two years after Defendants had filed fully briefed dispositive motions?

LIST OF PARTIES

Petitioners have correctly identified all of the parties to the proceeding in the court below.

Respondent Illinois Central Railroad Company is a wholly owned subsidiary of Illinois Central Corporation.

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BRIEF IN OPPOSITION OF RESPONDENT ILLINOIS CENTRAL RAILROAD COMPANY

Respondent Illinois Central Railroad Company ("ICG")[1] hereby opposes the petition for a writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Fifth Circuit in this case.

STATEMENT OF THE CASE

1. ICG engages in rail transportation operations along a generally north-south route between Chicago, Illinois, and various Gulf ports. ICG was formed as a result of a merger between the Illinois Central Railroad Co. ("IC") and the Gulf, Mobile and Ohio Railroad Co. ("GM&O")

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[1] At the time this litigation commenced, Respondent Illinois Central Railroad Company was known as Illinois Central Gulf Railroad Company. Accordingly, it will be referred to herein as "ICG".

approved by the ICC on December 20, 1971.[2] In its order granting the merger application, the ICC imposed its New Orleans Conditions for the protection of employees affected by the merger. 338 I.C.C. at 863-64. The Commission also imposed compulsory and binding arbitration on ICG, its unions, and its employees to resolve any disputes over an employee's labor protection rights or the proper interpretation of the conditions. Finally, the Commission ordered ICG to submit for ICC approval any future labor agreements modifying these protections. 338 I.C.C. at 864.

2. Following the approval of the IC-GM&O merger, ICG and its unions negotiated comprehensive collective bargaining agreements providing protections to persons employed on the date of the merger, August 10, 1972.[3] Each of these Merger Protection Agreements provides covered employees with a guaranteed income throughout their employment with ICG, not merely the five years of protection of the New Orleans Conditions. In exchange for this "lifetime" protection, however, the unions agreed to include "decline-in-business" formulae.[4] In addition, each agreement requires that all disputes over the meaning or interpretation of the agreement be resolved by final and binding arbitration. Pet. App. 31a-32a. ICG filed petitions with the ICC seeking approval of the Merger Protection Agreements, which the Commission granted on December 27, 1974. Pet. App. 21a-23a.

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[2] *Illinois Cent. Gulf R.R.—Acquisition—Gulf, M. & O. R.R.*, 338 I.C.C. 805 (1971).

[3] Portions of the Merger Protection Agreement between ICG and the Brotherhood of Locomotive Engineers are set forth at Pet. App. 24a-34a. The agreements with the other unions are comparable.

[4] The decline-in-business formulae provide that, in the event ICG's operating revenues and total revenue-freight ton-miles decline in any 30-day period more than five percent below the averages for the years 1969 and 1970, ICG may make a corresponding reduction in the number of protected employees. Pet. App. 29a-30a.

3. In the late 1970's ICG management began reviewing the railroad's operations to determine whether there were lines that were unprofitable and that were not essential to the railroad's central mission as a north-south carrier. On January 10, 1984, ICG entered into a Purchase and Sale Agreement with GMO Acquisition Corp. (later renamed Gulf & Mississippi Railroad Corporation ("G&M")) that provided for the sale to G&M of ICG's East Mississippi Lines. R. 416. The agreement required G&M to employ 210 of the ICG employees who were working on the lines. G&M filed a petition with the ICC seeking an exemption under 49 U.S.C. § 10505 from the prior approval requirements of 49 U.S.C. § 10901 for its acquisition of the East Mississippi Lines. G&M asked the Commission not to impose labor protection conditions on the transaction. ICG's unions objected.[5] On December 13, 1984, the ICC granted G&M's petition and, in keeping with its "long standing and judicially approved policy . . . not [to] impos[e] labor protective obligations upon newly formed acquiring carriers" such as G&M, declined to impose any labor protection obligations on either G&M or ICG. *Gulf & Mississippi R.R.—Purchase (Portion)—Exemption—Illinois Cent. R.R.*, 1984 ICC LEXIS 61, *13 (1984); Pet. App. 40a.

4. While G&M's ICC petition was pending, ICG's labor unions asked ICG to enter into collective bargaining agreements providing labor protection for ICG employees affected by the sale. The so-called "Transfer Agreements" were signed in early 1985, shortly after the Commission's decision denying all labor protection had been issued. ICG agreed to protect the income of employees who might subsequently be deprived of employment or placed in a lower paying job because of the sale for a period of up to six

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[5] Objections were filed by the Brotherhood of Railroad Carmen, the Brotherhood of Railway, Airline, and Steamship Clerks, and the Railway Labor Executives' Association ("RLEA"), representing the chief executive officers of all railway labor unions.

years. Each agreement provided for binding arbitration to resolve all disputes. Each Transfer Agreement acknowledged that some ICG employees were already entitled to labor protection from some other source, such as the Merger Protection Agreements. The Transfer Agreements did not supersede or nullify the Merger Protection Agreements: each provided that an affected employee could elect which agreement's protections would apply. Employees who voluntarily agreed to resign from ICG to work for G&M were paid a severance allowance of $25,000 by ICG as a result of the Transfer Agreements.[6]

5. Prior to the closing of the sale G&M contacted ICG employees who were working on the East Mississippi Lines and offered them positions on the new railroad. Those who voluntarily chose to join G&M received $25,000 in severance pay from ICG. Those who declined remained with ICG and received the income protections provided in the Transfer Agreements or, if otherwise eligible and the employee so chose, the income protections of a Merger Protection Agreement. Approximately 207 employees joined G&M and resigned from ICG, effective July 8, 1985, the date of the sale. R. 40.

6. On June 12, 1985, Plaintiffs Fleenor, Pace, Jones, Wash, Pierce, and Mitchell filed this lawsuit against ICG, the unions representing its employees, and G&M.[7] Plaintiffs asserted in their Amended Complaint that their claims arose under Subchapter I of the Railway Labor

[6] In exchange, the unions, through RLEA, agreed to withdraw the petition that had been filed in the D.C. Circuit to review the ICC order approving the sale. The so-called ICG Concerned Workers Association, to which all of the Plaintiffs herein belonged, sought leave to intervene in the court of appeals in order to prosecute the appeal. On July 1, 1985, the D.C. Circuit dismissed the attempted intervention because the ICG Concerned Workers Association had not been a party before the ICC and, therefore, lacked standing to seek review of the Commission's order. R. 404.

[7] None of the Plaintiffs had chosen to join G&M. Thus, following the sale of the East Mississippi Lines, all remained ICG employees.

Act ("RLA"), 45 U.S.C. §§ 151-163, and certain provisions of the Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 11343, 11345, 11347, and 11705. R. 30.

7. Plaintiffs alleged in their Second Cause of Action, directed at ICG, that ICG had "breached and repudiated" the Merger Protection Agreements by "entering into and carrying out the Purchase and Sale Agreement with G&M" and by "taking actions with the purpose and effect of reducing the value of the East Mississippi lines in order to facilitate its sale to G&M." R. 52. Plaintiffs further alleged that ICG, together with G&M and the unions, had "combined and conspired . . . to undermine and destroy the contractual rights of ICG employees pursuant to the [Merger Protection] Agreement." R. 51.[8]

8. Both railroads and all but one of the unions filed Answers to the Amended Complaint in late summer 1985, denying these claims and asserting various defenses. R. 78, 221, 248, 256, 277, 292. One union filed a motion to dismiss or, in the alternative, for summary judgment. R. 303.

9. During discovery, each Plaintiff testified that his claims against ICG arose from a dispute with ICG over the interpretation and application of the decline-in-business provisions in the Merger Protection Agreements: namely, whether ICG could use the decline-in-business formulae to reduce the number of employees entitled to benefits under the Merger Protection Agreements as a result of a loss of business flowing from a voluntary line sale.[9] Two of the Plaintiffs—Wash and Jones—admitted

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[8] In their First Cause of Action, Plaintiffs alleged that the unions had breached their duty of fairly representing them in connection with the East Mississippi Lines sale. R. 48. In their Third Cause of Action, Plaintiffs alleged that G&M had tortiously interfered with the rights of ICG's employees under the Merger Protection Agreements. R. 53.

[9] ICG's application of the decline-in-business formulae to business losses flowing from voluntary line sales and abandonments has been

that they were not covered by the Merger Protection Agreements since they had been hired by ICG after the IC-GM&O merger. Each of the remaining Plaintiffs admitted that he had not been adversely affected by ICG's interpretation of the decline-in-business formulae and that none of his rights under the Merger Protection Agreements had been infringed by the railroad.

10. On October 15, 1986, the district court entered an Agreed Scheduling Order, which provided that all discovery was to be completed on or before October 31, 1986; that motions for joinder of parties or amendments to the pleadings were to be served on or before October 23, 1986; and that all other motions, with the exception of evidentiary *in limine* motions, were to be served on or before November 28, 1986. R. 387.

11. All Defendants filed dispositive motions to dismiss or for summary judgment with respect to the personal claims of the six Plaintiffs by the November 28, 1986, date set in the Agreed Scheduling Order or within brief extension periods granted by the district court. R. 395, 515, 705, 716, 886, 946. Plaintiffs filed no motions seeking to join any other party or to amend their pleadings by the October 23, 1986, date set in the Agreed Scheduling Order. Although the case had been styled in Plaintiffs' Amended Complaint as a class action, Plaintiffs did not file a motion seeking class certification by the November 28, 1986, date set for the filing of all other motions.

12. After Plaintiffs had received Defendants' motions to dismiss, they filed a Motion for Stay of Proceedings and Referral to Interstate Commerce Commission. R. 538. Although Plaintiffs had themselves invoked the jurisdiction of the district court to resolve their dispute with ICG, they asserted in their motion that, because their claims that ICG had "breached and repudiated" the

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upheld in arbitration under the ICG-Brotherhood Railway Carmen Merger Protection Agreement. Pet. App. 43a-54a.

Merger Protection Agreements depended on an interpretation of the decline-in-business provisions in those agreements, the Commission, not the court, was the appropriate body to interpret them.[10]

13. Eighteen months passed, and Plaintiffs filed nothing with the ICC. Finally, on June 24, 1988, Plaintiffs, through the ICG Concerned Workers Association, filed a petition with the ICC asking the Commission to rule that ICG had violated the decline-in-business formula in the Merger Protection Agreements.[11] On March 28, 1989, the ICC denied the petition, ruling that any dispute over the proper interpretation of the decline-in-business formula was subject to mandatory arbitration under the Merger Protection Agreements.[12] The Commission subsequently denied two requests to reconsider its ruling.[13]

14. On July 21, 1989, while Defendants' dispositive motions were pending, Plaintiffs filed two additional motions with the district court: one seeking certification of the case as a class action and one seeking leave to amend their complaint to add one hundred eighty-four (184) additional plaintiffs. R. 1013, 1068.

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[10] Memorandum of Points and Authorities in Support of Reply to Railroad Defendants' Motions to Dismiss, or Alternatively for Summary Judgment, and in Support of Plaintiffs' Motion for a Stay at 11-12, filed on or about December 30, 1986.

[11] The "Petition of the ICG Concerned Workers Association, Pursuant to 49 U.S.C. § 10505(d) and 49 C.F.R. §§ 1115.4, 1115.5 and 1117.1, to Reopen These Proceedings and for the Imposition of Labor Protective Conditions and Other Relief" was filed in six separate ICC proceedings, including Finance Docket No. 25103, *Illinois Cent. Gulf R.R.—Acquisition—Gulf, M. & O. R.R., Illinois Cent. R.R.*, the 1972 IC-GM&O merger case.

[12] *Illinois Cent. Gulf R.R.—Acquisition—Gulf, M. & O. R.R., Illinois Cent. R.R.*, 1989 ICC LEXIS 81 (1989); Pet. App. 55a-63a.

[13] *Illinois Cent. Gulf R.R.—Acquisition—Gulf, M. & O. R.R., Illinois Cent. R.R.*, 1989 ICC LEXIS 250 (1989) (Pet. App. 64a-65a); *Illinois Cent. Gulf R.R.—Acquisition—Gulf, M. & O. R.R., Illinois Cent. R.R.*, 1990 ICC LEXIS 227 (1990).

15. The district court issued its bench opinion on all the pending motions on May 22, 1990. Pet. App. 2a-15a. After summarizing the facts surrounding the East Mississippi Lines transaction, the court found: (a) that Plaintiff Mitchell had admitted that his rights under the applicable Merger Protection Agreement and the ICC order approving it had not been violated; (b) that Plaintiff Wash was even not covered by a Merger Protection Agreement and, accordingly, had no standing to make claims concerning alleged violations of that agreement; (c) that Plaintiff Pace had no facts to support his claim that any of his rights under the applicable Merger Protection Agreement had been violated; and (d) that Plaintiffs Fleenor, Jones, and Pierce made "like statements in their depositions." Pet. App. 7a-8a. Based on these findings, the Court granted the unions' motions for summary judgment as to each Plaintiff. Pet. App. 8a.

16. The court found as a matter of law that it lacked subject matter jurisdiction over Plaintiffs' claims that ICG had "breached and repudiated" the Merger Protection Agreements because the dispute was a "minor" dispute subject to mandatory arbitration under the RLA. Pet. App. 9a.

17. The court also dismissed Plaintiffs' claims against G&M, finding that Plaintiffs had presented no evidence that G&M had "colluded" with the Unions. Moreover, it ruled that, in the absence of a surviving federal claim against G&M, it would not consider any surviving state law claims against G&M under the doctrine of pendent jurisdiction. Pet. App. 9a.

18. Having dismissed the claims of the six Plaintiffs against each of the Defendants, the court denied Plaintiffs' motions to certify the case as a class action or to amend the complaint to add 184 new plaintiffs, ruling that "too much time has lapsed from the filing of the complaint until the bringing of these motions." In particular, the court noted Plaintiffs' failure to comply with

the Agreed Scheduling Order. Pet. App. 9a-10a. The court further determined that certification of the case as a class action would be inappropriate in view of the fact that none of the six Plaintiffs had a personally viable claim. Pet. App. 10a.

19. On appeal, the Fifth Circuit affirmed the district court's judgment on the basis of its rulings, without issuing an opinion. Pet. App. 1a.

ARGUMENT

The court of appeals disposed of this case under its Local Rule 47.5, which provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pet. App. 1a. This case is no more worthy of this Court's attention than it was worthy of a published opinion below.

1. The district court properly applied the standards enunciated by this Court in *Celotex Corp* v. *Catrett*, 477 U.S. 317 (1986), to the facts established during discovery in granting the union defendants' motions for summary judgment. The gravamen of Plaintiffs' claims against the unions, insofar as ICG is concerned, was that the unions had breached their statutory duty to represent Plaintiffs fairly by conspiring with ICG and G&M to deprive Plaintiffs of their rights under the Merger Protection Agreements.[14] However, as the district court found, each Plaintiff had admitted in his deposition either that he was not covered by a Merger Protection Agreement or that none of his rights under such agreement had ever been violated by ICG. Pet. App. 7a-8a. Evidence that Plaintiffs claim to have found after those depositions concerning

[14] Plaintiffs also claimed that the unions had failed to represent them adequately before the ICC in connection with G&M's application to purchase the East Mississippi Lines. Such claims did not implicate ICG.

ICG's alleged motivation in selling the East Mississippi Lines or concerning the "impact" of the sale on other ICG employees (Pet. 15-16) simply did not create a genuine issue of material fact with respect to the merits of the named Plaintiffs' claims.

2. Having properly dismissed the breach-of-duty claims against the unions relating to the alleged deprivation of Plaintiffs' rights under the Merger Protection Agreements, the district court correctly determined that any dispute that remained with ICG over the proper interpretation and application of the decline-in-business formulae contained in those agreements was a "minor dispute" subject to compulsory arbitration under Section 3 First (i) of the Railway Labor Act, 45 U.S.C. § 153 First (i). This was a garden-variety application of the well-settled distinction between "major" and "minor" RLA disputes articulated in this Court's decisions in *Consolidated Rail Corp.* v. *Railway Labor Exec's' Ass'n*, 491 U.S. 299 (1989); *Union Pacific R.R.* v. *Sheehan*, 439 U.S. 89 (1978), and *Locomotive Eng'rs* v. *Louisville & N. R.R.*, 373 U.S. 33, 38 (1963). Plaintiffs' assertion that "ICG . . . substantively modified the [Merger Protection] Agreements to permit ICG to reduce its labor force and to avoid paying just compensation to discarded and displaced employees," and, hence, that this dispute is "major," is simply a disingenuous mischaracterization, as the courts below plainly recognized.

Nor is there merit to Plaintiffs' claims that the district court should have retained jurisdiction over this contract interpretation dispute because arbitration would have been futile or because ICG had "repudiated" arbitration. Pet. 24. Plaintiffs never filed or attempted to file a claim or grievance under the dispute resolution procedures in the Merger Protection Agreements, hardly surprising in view of their admissions that they either were not entitled to benefits under those agreements or had suffered no loss of benefits to which they were en-

titled thereunder. Finally, their assertion that ICG refused to institute arbitration proceedings when requested following the entry of judgment by the district court (Pet. 12 & n.6) is false. ICG simply would not agree to Plaintiffs' unilateral demand for "expedited arbitration" (a procedure not provided for in either the Merger Protection Agreements or the Transfer Agreements) and would not agree to proceed with the claims asserted until proper preliminary procedures had been followed under those agreements.[15] The district court quite properly determined that it lacked subject matter jurisdiction with respect to Plaintiffs' claims against ICG and that it would not interfere with the arbitration process as Plaintiffs sought. Pet. App. 13a, 17a, 19a-20a.

3. The district court acted well within its discretion in denying Plaintiffs' eleventh-hour motions to certify this case as a class action or to add nearly two hundred new plaintiffs. The motions were filed in flat violation of the court's scheduling order, long after the close of discovery, and in a transparent effort to moot the court's consideration of long-pending dispositive motions. Nothing Plaintiffs have said on this score in their Petition warrants review under the standards of S. Ct. Rule 10.1.

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[15] In particular, ICG requested information concerning "the dates employees were supposedly affected" and the "provision of any agreement that was violated." This was necessary to enable ICG to evaluate the merits of the claims, particularly because, as ICG explained, more than 60 of the employees on whose behalf Plaintiffs' counsel purported to assert claims had been hired only *after* the East Mississippi Lines sale and could not have been affected by that transaction. Moreover, ICG could not determine from the sketchy information that Plaintiffs' counsel provided whether another sizeable group had ever been employed by the carrier.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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